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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, Plaintiff, **v.** **IIPAY NATION OF SANTA YSABEL, also known as SANTA YSABEL BAND OF DIEGUENO MISSION INDIANS, a federally-recognized Indian Tribe, SANTA YSABEL INTERACTIVE, a tribal economic development entity, SANTA YSABEL GAMING COMMISSION, DAVID CHELETTE, DAVID VIALPANDO, ANTHONY BUCARO, MICHELLE MAXCY, VIRGIL PEREZ, and BRANDIE TAYLOR,** Defendants.	Case No. 3:14-cv-02724-AJB-NLS **STATE OF CALIFORNIA'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** Date: March 5, 2015 Time: 2:00 p.m. Dept: 3B Judge: Hon. Anthony J. Battaglia Trial Date: None Set Action Filed: November 18, 2014

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INTRODUCTION

The State of California (State) respectfully requests that the Court deny the Iipay Nation of Santa Isabel's (Tribe) and the other defendants' motion to dismiss this action. Even though Indian tribes generally have sovereign immunity, no basis for that immunity is available here. In the Indian Gaming Regulatory Act (IGRA), Congress specifically authorizes suits by states to enjoin gaming activity on Indian lands that is conducted in violation of tribal-state class III gaming compacts. Such an injunction is what the State's suit seeks. Additionally, the Tribe waived its sovereign immunity in its tribal-state class III gaming compact (Compact) with the State. The Tribe therefore does not enjoy sovereign immunity from the State's action.

Defendants also assert that the State did not follow the processes provided in the Compact before filing this action. That assertion is incorrect. The Compact provides that the parties meet and confer. The complaint's allegations and the evidence show that the Tribe rejected the State's attempt to meet and confer about Internet gambling. The Compact also provides the power to seek immediate relief and go to federal court for an injunction. That is exactly what the State has done.

Because defendants' assertions have no merit, the State respectfully requests that the Court deny the motion to dismiss.

THE FACTS AND ALLEGATIONS UNDERLYING THE STATE'S SUIT

The principal facts and allegations underlying the State's suit are:

- The Tribe and State entered into the Compact. (Dhillon Decl. 2, ¶ 3 (ECF 3-3, 2); Compl. Ex. 1 (ECF 1-2).)
- Before this Court entered a temporary restraining order, the Tribe offered and provided Internet gambling to persons not located on the Tribe's Indian lands. (Scott Decl. 2, ¶ 3 (ECF 3-4, 2); Dhillon Decl. 2, ¶ 4 (ECF 3-3, 2); *see* Chelette Decl. 2, ¶ 3 (ECF 6, 2).)

- Wagers for the Tribe's Internet gambling were made from locations not on the Tribe's Indian lands. (Scott Decl. 3, ¶ 7 (ECF 3-4, 3); Chelette Decl. Ex. 2, E18 (ECF 6, 26).)
- The Internet gambling system – e.g., servers and other equipment integral to it – is located and operated on the Tribe's Indian lands. (Chelette Decl. 4, ¶ 7(b) (ECF 6, 4); Compl. ¶ 34.)
- The State brought this action alleging that the Internet gambling breaches the Compact and violates the Unlawful Internet Gambling Enforcement Act (UIGEA). (Compl. ¶¶ 40-51.)
- The State seeks injunctive relief under both the Compact and the UIGEA. (Compl., Prayer and Relief Requested, ¶ 1.)
- After an extended hearing, the Court concluded that the State was entitled to extraordinary relief and granted the State's motion for a temporary order. (Order Granting Motion for Temporary Restraining Order and Order To Show Cause (ECF 11) (TRO Order).)

In sum, the principal facts and allegations show that the State seeks injunctive relief relating to the Tribe's Internet gambling that occurs both on and off its Indian lands. According to defendants, the gaming activity conducted on the Tribe's Indian lands includes essential elements and systems for its virtual gaming. Wagering by Californians is gaming activity that is incidental, and entirely necessary, to what the Tribe does on its Indian lands. The Internet gambling, and particularly the essential gaming activity conducted on the Tribe's Indian lands, breaches the Compact and violates the UIGEA.[1] As set forth below, these facts and allegations provide the Court with subject matter jurisdiction and show that the Tribe does not enjoy sovereign immunity from the State's suit.

---

[1] The Court has concluded that the State is likely to succeed on the merits of its claims for breach of Compact and under the UIGEA. (TRO Order 7-14 (ECF 11, 7-14).)

ARGUMENT

I. THE COURT HAS SUBJECT MATTER JURISDICTION

Under the facts, the Court clearly has subject matter jurisdiction pursuant to 28 U.S.C. § 1331. *See Cabazon Band of Mission Indians v. Wilson,* 124 F.3d 1050, 1055-56 (9th Cir. 1997), *cert. denied sub nom. Wilson v. Cabazon Band of Mission Indians,* 524 U.S. 926 (1998); *see also Michigan v. Bay Mills Indian Community*, 572 U.S. __, 134 S.Ct. 2014, 2030 n.2 (2014) (*Bay Mills*). The action arises under, and alleges breach of, the Compact. The action seeks relief specifically allowed by the Compact and statute. (*See* Compact 29, § 9.1 (ECF 1-2, 31) (injunctive relief), 30-31, § 9.4(a)(2) (ECF 1-2, 32-33) (same); 31 U.S.C. § 5365(b)(2) (injunctive relief including temporary restraining orders and preliminary and permanent injunctions).) The State seeks to enforce the Compact, which is a creation of federal law and entered into pursuant to IGRA.

II. THE TRIBE DOES NOT HAVE SOVEREIGN IMMUNITY FROM THE STATE'S SUIT

Defendants assert that the facts here show that sovereign immunity bars the State's action.[2] Defendants' argument is that because some portion of the Internet gambling occurs off of Indian lands, the Court does not have jurisdiction. They rely upon *Bay Mills* and *Oklahoma v. Hobia*, No. 12-5134 (10th Cir. Dec. 22, 2014) (ECF 15-2, 60) (*Hobia*) for their sovereign immunity bar argument. Both cases,

[2] Defendants assert that the Tribe's sovereign immunity extends to all of them. (Defendants' Memorandum of Points and Authorities in Support of Motion To Dismiss Complaint Due to Lack of Subject-Matter Jurisdiction 8 (MTD Memo).) While having no bearing on the motion, this assertion appears to be at odds with Supreme Court authority. In *Bay Mills*, the Supreme Court discussed the capacious scope of Michigan's authority over illegal gaming occurring off Indian lands. The Court wrote: "Unless federal law provides differently, 'Indians going beyond reservation boundaries' are subject to any generally applicable state law. See *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973))." 134 S.Ct. at 2034-35. The Court observed that tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officials, responsible for off-reservation unlawful conduct. *Id.* at 2035.

however, are inapposite. They are distinguishable factually and legally. Therefore, the Tribe's asserted sovereign immunity bar does not apply here.

The State acknowledges that sovereign immunity bars most suits against Indian tribes. But sovereign immunity does not bar all suits against Indian tribes. "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity . . . ." *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981) (a tribe can waive immunity and consent to suit without explicit Congressional authority). Here, Congress has authorized suit, and the Tribe also has waived its immunity. The Tribe, therefore, is subject to suit.

A. Sovereign Immunity Is Not Available Because Congress Has Authorized Suit Against a Tribe To Enjoin Class III Gaming Conducted in Violation of a Compact

In IGRA, Congress authorizes lawsuits against Indian tribes. *See* 25 U.S.C. 2710(d)(7)(A)(ii). Under IGRA, the State may sue in federal court to enjoin a class III gaming activity located on Indian lands and conducted in violation of any tribal-state compact that is in effect. *Id.*; *Bay Mills*, 134 S.Ct. at 2029. Here, the Complaint alleges, and the Court found,[3] that some class III gaming activity takes place on the Tribe's Indian lands. (Compl. ¶ 34.) Defendants' evidence presented in opposition to the State's motion for a temporary restraining order proves this allegation. (*See* Chelette Decl., Ex. 2, E18-20 (ECF 6, 26-28).) The Complaint alleges that the gaming activity is conducted in violation of the Compact. (Compl. ¶¶ 40-43.) Thus, the State's suit is to enjoin class III gaming activity located on Indian lands and conducted in violation of the Compact.

Even though the State's suit clearly falls within Congress' authorization in

[3] In granting the State's motion for a temporary restraining order, the Court heard argument, reviewed evidence, and determined that it "is convinced that the internet gaming provided here is Class III." (TRO Order 11 (ECF 11, 11).)

IGRA, defendants seize on the fact that the Tribe's class III gaming activity straddles the borders of its Indian lands. By defendants' own evidence, the essential elements – except for the bettors – for that class III gaming activity are operated on and emanate from the Tribe's Indian lands. Defendants, however, assert that, by soliciting and accepting wagers from bettors located off its Indian lands, the Tribe falls outside Congress' authorization for suit. In other words, defendants claim that having a single element of many occur off Indian lands immunizes all gaming activities conducted on Indian lands. Defendants rely on *Bay Mills* and *Hobia* for this remarkable assertion.

Gaming activity that straddles the borders of the Tribe's Indian lands makes the present case factually distinguishable from *Bay Mills* and *Hobia*. Neither of those cases addressed gaming activity conducted as it is here. Rather, both cases examined gaming activity occurring completely, and unquestionably, off of a tribe's Indian lands.

In *Bay Mills*, Michigan sued to enjoin the Bay Mills Indian Community from opening a casino that was 125 miles from its reservation. *Bay Mills*, 134 S.Ct. at 2029. Even though a tribal-state class III gaming compact existed, its remedies were limited to arbitration. *Id.* The compact expressly provided that nothing in it shall be deemed a waiver of either the tribe's or the state's sovereign immunity. *Id.* Without a waiver,[4] the Supreme Court identified its role as "[u]nless Congress has authorized Michigan's suit, our precedents demand that it be dismissed." *Id.* at 2032. The Court concluded that because the gaming activity[5] did not occur on the tribe's Indian lands, Congress had not authorized Michigan's suit in 25 U.S.C. §

[4] Michigan did not argue that the Bay Mills Indian Community waived its sovereign immunity from suit. *Bay Mills*, 134 S.Ct. at 2032 n.4.

[5] The Supreme Court rejected Michigan's argument that authorizing, licensing, and operating the casino from the tribe's reservation constituted class III gaming activities. In doing so, the Court stated that class III gaming activity means just what it sounds like – "the stuff involved in playing class III games" – i.e., what goes on in a casino. *Bay Mills*, 134 S.Ct. at 2032.

2710(d)(7)(A)(ii). *Id.* at 2032. Therefore, the suit properly was dismissed.

Relying on *Bay Mills*, *Hobia* reached a similar conclusion with respect to a proposed casino that was not located in whole or in part on a tribe's Indian lands. The Tenth Circuit held that Oklahoma had no statutory right of action under IGRA. As in *Bay Mills*, a tribal-state class III gaming compact was in effect. But the court held that the compact effectively forbid a suit by "strictly" limiting the remedies available. *Hobia*, ECF 15-2, 84. The compact provided that either party may refer a dispute arising under the compact to arbitration. Oklahoma thus was precluded from suing the tribe or tribal officials in federal court. The court noted that Oklahoma "could have insisted on a compact that allowed it to sue the Tribe or tribal officials in federal court for violations of the compact, but it failed to do so." *Id.*, ECF 15-2, 84 n.4.

In sum, *Bay Mills* and *Hobia* focused on whether Congress authorized suit with respect to gaming activities that did not occur, in whole or in part, on Indian lands. Both cases' facts stand in stark contrast to the present case's facts. Here, no dispute exists that gaming activities – "the stuff involved in playing class III games," *Bay Mills*, 134 S.Ct. at 2032 – occur on the Tribe's Indian lands. The gaming activity, both on and off the Tribe's Indian lands, is an integrated virtual system. (Chelette Decl. 5, ¶ 9 (ECF 6, 5).) That gaming activity is all part of the Tribe's Internet gambling. The State seeks to enjoin class III gaming activity conducted in violation of the Compact on the Tribe's Indian lands. Thus, the State's suit is authorized by Congress under 25 U.S.C. § 2710(d)(7)(A)(ii).[6]

B. The State's Suit Arises out of the Compact, and the Tribe Waived Sovereign Immunity with Respect to this Suit

Another, and important, difference between *Bay Mills* and *Hobia*, on the one

[6] The Tribe's express waiver discussed below effectively makes 25 U.S.C. § 2710(d)(7)(A)(ii) an alternative basis for concluding sovereign immunity is not available here.

hand, and the present case, on the other, is that the Compact explicitly and unequivocally waives the Tribe's sovereign immunity from the State's suit. That waiver applies to claims for non-monetary remedies regarding issues arising under the Compact:

> (a) In the event that a dispute is to be resolved in federal court or a state court of competent jurisdiction as provided in this Section 9.0, the State and the Santa Ysabel Tribe expressly consent to be sued therein and waive any immunity therefrom that they may have provided that:
>
> (1) The dispute is limited solely to issues arising under this Gaming Compact;
>
> (2) Neither side makes any claim for monetary damages (that is, only injunctive . . . or declaratory relief is sought); and
>
> (3) No person or entity other than the Santa Ysabel Tribe[7] and the State is party to the action . . . .

(Compact 30-31, § 9.4 (ECF 1-2, 32-33).) Thus, unlike *Bay Mills* and *Hobia*, where the states limited their remedies, the State entered into the Compact allowing it to sue the Tribe and tribal officials in federal court for violations of the Compact. *See Hobia*, ECF 15-2, 84 n.4.

The State's case clearly is limited solely to issues arising under the Compact.[8] The Tribe agreed not to engage in class III gaming that is not expressly authorized in the Compact. (Compact 7, § 3.0 (ECF 1-2, 9).) The only Internet gambling expressly allowed by the Compact is "devices and games that are authorized . . . to the California State Lottery" that others in the State are permitted

[7] The Compact defines "Santa Ysabel Tribe" to include the Tribe as well as its authorized officials and agencies. (Compact 6, § 2.13.1 (ECF 1-2, 8).)

[8] Even though the UIGEA claim may not arise directly from the Compact, the claim certainly is within the Compact's ambit. The Tribe, among other things, agreed to prevent illegal activity in operating its class III gaming activities. (Compact 25, § 8.1.4 (ECF 1-2, 27).) Moreover, the UIGEA provides still another Congressional authorization to sue – i.e., an abrogation of sovereign immunity – based upon the enforcement authorities of a tribal-state III gaming compact. 31 U.S.C. § 5365(b)(3)(A)(ii).

to offer through the Internet under state and federal law. (Compact 8, § 4.1(c) (ECF 1-2, 10.) No one is permitted to offer any California State Lottery game through the Internet. (Dhillon Decl. 3, ¶ 8 (ECF 3-3, 3).)

The Compact also provides that the Tribe may combine and operate in its gaming facility "any forms or kinds of gaming permitted under law, *except to the extent limited under IGRA [or] this Compact* . . . ." (Compact 8, § 4.2 (ECF 1-2, 10) (emphasis added).) The Tribe's gaming agency is, among other things, to ensure enforcement of all relevant laws and rules and to prevent illegal activity occurring with regard to the business enterprise that offers and operates class III gaming activities and within the facilities that serve that business enterprise. (Compact 25, §§ 8.1.1 & 8.1.4 (ECF 1-2, 27).) IGRA does not authorize tribal gaming off of Indian lands. *Neighbors of Casino San Pablo v. Salazar*, 773 F.Supp.2d 141, 143 (D.D.C. 2011); *see also State ex rel. Nixon v. Coeur d'Alene Tribe*, 164 F.3d 1102, 1108 (8th Cir. 1999); *AT&T Corporation v. Coeur d'Alene Tribe*, 45 F. Supp.2d 995, 1001 (D. Idaho 1998), *rev'd on other grounds*, 295 F.3d 899 (9th Cir. 2001). Moreover, the Tribe's conduct violates the UIGEA. (Compl. ¶¶ 46-51.)

The Tribe's offering of its class III facsimile of bingo over the Internet breaches its duties, and the State's claim arises, under the Compact. The Compact's waiver of sovereign immunity applies. By virtue of its agreements under the Compact, the Tribe has consented to the State's suit.

III. THE STATE'S SUIT COMPLIES WITH COMPACT PROCESSES

Defendants assert that the State failed to adhere to mandatory procedures set forth in the Compact and, therefore, this action is barred. (MTD Memo 13-18.) Defendants do not explain exactly how this relates to subject matter jurisdiction and is properly within the scope of a Federal Rules of Civil Procedure 12(b)(1) motion. Nonetheless, the State will address it. The State's suit complies with Compact processes and, therefore, is proper.

Contrary to defendants' assertion, the State satisfied the Compact's meet and confer requirement. On July 14, 2014, the State sent a letter to the Tribe's Chairman requesting the Tribe to meet and confer. That letter mentioned both Internet poker and Internet bingo. (Dhillon Decl. Ex. B (ECF 9, 6-7).) The letter also expressly advised that it was "without prejudice to the State's right to seek injunctive relief against the Santa Ysabel Tribe when circumstances are deemed to require immediate relief." (*Id.* (ECF 9, 6).)

The Tribe responded. (Dhillon Decl. Ex. C (ECF 9, 9-12).) It advised that it had no intention of offering any class III games and that it was "at a quandary in understanding the relevance of [its] tribal-regulated Class II gaming, conducted from servers located on tribal lands, and our Gaming Compact with the State." (*Id.* (ECF 9, 9).) The Tribe specifically addressed the State's reference to Internet bingo:

> While bingo is also defined as a Class II gaming activity on tribal lands, Santa Ysabel does not offer bingo through Santa Ysabel Interactive, or have any plans to do so in the near future. Again, if Santa Ysabel did contemplate offering bingo in an interactive environment, because of the activity's classification as Class II gaming, we do not feel that the activity would in any way be covered by or have any relevance to our Tribal-State Gaming Compact.

(*Id.* (ECF 9, 10).) The Tribe continued that it had "no intention of discussing any federal statutes, including the Indian Gaming Regulatory Act or the Unlawful Internet Gaming Enforcement Act with *any State of California government official*." (*Id.* (emphasis added).) The Tribe thus made clear that it would not meet and confer regarding (1) any game that it had concluded was class II, (2) IGRA, or (3) the UIGEA.

1 In sum, the State attempted to meet and confer under the Compact, but the
2 Tribe refused. The Tribe clearly disputed, and continues to dispute, the State's
3 position, which is the same now as it was in July 2014: Internet gambling is not
4 allowed under IGRA, breaches the Compact, and violates the UIGEA. In fact, the
5 Tribe specifically rejected any meet and confer over the very issues at the center of
6 this suit.
7 Defendants also assert that the State's action is premature as they were not
8 given sixty days to cure their Compact breach. (MTD Memo 16.) In making that
9 assertion, defendants disregard that the Compact specifically provides "the right of
10 either party to seek injunctive relief against the other when circumstances are
11 deemed to require immediate relief . . . ." (Compact 29, § 9.1 (ECF 1-2, 31).)
12 Here, the State exercised that right, and the Court granted injunctive relief.
13 Moreover, the Compact's sixty-day notice provision relates to termination.
14 (*See* Compact 38, § 11.2 (ECF 1-2, 40) (labeled "Term of Compact;
15 Termination").) The provision does not apply to injunctive relief or specific
16 performance. Rather, it provides in pertinent part:
17 Either party may bring an action in federal court, after
18 providing a sixty (60) day written notice of an
19 opportunity to cure any alleged breach of this Compact,
for a declaration that the other party has materially
20 breached this Compact. Upon issuance of such a
declaration, the complaining party may unilaterally
21 terminate this Compact upon service of written notice on
22 the other party.
23 (Compact 38, § 11.2.1(b) (ECF 1-2, 40).)
24 By filing and serving the Complaint – more than sixty days ago – the State
25 gave notice:
26 By this Complaint and pursuant to Compact section
27 11.2.1(c) [sic], the State gives the Tribe written notice of
an opportunity to cure its breach of the Compact. If the
28 Tribe does not cure within sixty days, the State is entitled

to a declaration that the Tribe has materially breached the Compact.

(Compl. ¶ 45.) The Tribe has had notice for more than sixty days. *See Fleishman v. Blechman*, 148 Cal.App.2d 88, 95-96 (1957) (complaint alone gave adequate notice of trust revocation). The Tribe, however, has not cured the breach.

Consistent with its refusal to meet and confer, the Tribe continues to assert that its Internet gambling is fully within its powers and does not breach the Compact. Consequently, a separate notice – independent of the State rightfully seeking an injunction for the Compact's breach and UIGEA violations – would have been an idle gesture and unnecessary as those issues already were before the Court. *See Steen v. Bd. of Civil Serv. Comm'rs*, 26 Cal.2d 716, 721 (1945); *Van Gammeren v. Fresno*, 51 Cal.App.2d 235, 239-40 (1942).

In sum, the State's suit complies with the Compact processes and is proper.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny defendants' motion to dismiss, order them to answer within ten days, and order this case to proceed in accordance with the Order Granting Joint Motion Re: Scheduling Plan.

Dated: January 20, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2015, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

STATE OF CALIFORNIA'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 20, 2015, at Sacramento, California.

William P. Torngren	/s/ WILLIAM P. TORNGREN
Declarant	Signature